Supreme Court of the United States

October Term, 1957

No. 165

In the Matter of the Application of

MAX LERNER,

Appellant,

For an Order Under Article 78 of the Civil Practice Act,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting the New York City Transit Authority,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEES' BRIEF

February 24, 1958.

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Jurisdiction

The appellant has invoked the jurisdiction of this Court under Title 28, U. S. C., § 1257(2). The appellees submit that no substantial question under the Constitution or laws of the United States was raised by the dismissal of this public employee pursuant to the Security Risk Law of the State of New York (L. 1951, c. 233, as amended). As shall be demonstrated *infra*, the dismissal of the appellant, based

upon his refusal to answer proper questions put to him for his public employer and related to his loyalty, was based upon adequate non-federal grounds. The fact that the appellant failed to avail himself of the process provided by the statute, *i.e.*, the right to a full administrative review, precludes his invoking the jurisdiction of the federal courts in an area of state activity.

This Court has postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 103).

Questions Presented

1. Whether this Court should take jurisdiction of the appeal by reason of the failure of the appellant to avail himself of his right to administrative review of his dismissal from his civil service position, by an appeal to the State Civil Service Commission, wherein all of the allegations of violations of his constitutional rights could have been raised (N. Y. State Security Risk Law, L. 1951, c. 233, § 6; McK. Unconsol. Laws § 1106).

2. Whether a public employer may, after due consideration, dismiss a civil service employee who refuses to answer questions as to present Communist Party membership duly put to him on behalf of his employer, upon the ground that such refusal constitutes reasonable grounds for the belief that the employee is of doubtful trust and reliability within the meaning of a state statute enacted for the protection of the security of the nation and the state (L. 1951, c. 233).

Statement of the Case

The New York City Transit Authority (hereinafter called the "Authority") is a body corporate and politic constituting a public benefit corporation (Public Authorities Law, § 1201, Cons. Laws, ch. 43-A). The Authority was created by the State Legislature to operate the city-owned rapid transit railroad lines, omnibus lines, power plants and other instrumentalities used in connection therewith, previously under the jurisdiction of the Board of Transportation of the City of New York. It is the Authority's statutory duty to operate these facilities for the convenience and safety of the public, which purposes are declared to be in all respects for the benefit of the people of the State of New York. In carrying out such purposes, the Authority is declared to be performing a governmental function (Public Authorities Law, § 1202).

All of the Authority's employees are public employees in the classified civil service whose appointment, promotion and continuance in employment are governed by the provisions of the Civil Service Law of the State of New York and the rules of the City Civil Service Commission (Public Authorities Law, § 1210).

The appellant was employed by the Authority as a conductor on the IND Division of the subway system (R. 10). In Appendix A of this brief will be found the pertinent provisions of notice of examination for promotion to conductor, issued by the City Civil Service Commission; in Appendix B will be found excerpts from Rules and Regulations adopted and promulgated by the Authority, pursuant to Public Authorities Law, § 1204, in so far as they relate to the duties of conductor. From these it appears that a conductor has emergency responsibilities as well as routine duties. As a uniformed employee he has general access to the operating areas of the transit system, not open to the public at large.

The New York State Security Risk Law was based upon a specific legislative finding—first, that by reason of the armed aggression in Korea and the proclamation by the President of a national emergency, there existed a serious public emergency in the State of New York, and second, a more general finding, that the employment of members of subversive groups and organizations presented a grave peril to the state and national security. The Legislature concluded that it was vital and essential that measures be taken to effect the suspension and removal from security positions of persons in governmental service concerning whom reasonable grounds exist for the belief that because of doubtful trust and reliability their employment in such positions would endanger the security or defense of the nation and the state (Security Risk Law, L. 1951, c. 233, § 1). From the enactment of the law to date the New York State Legislature has recognized the continued dangerous world situation and has renewed the Security Risk Law each year up to and including the current legislative session.

The statute provides that the State Civil Service Commission shall determine whether an agency is a security agency within the meaning of the law, thereby bringing all of the employees of such agency within its purview, or whether only certain positions within an agency are security positions. Effective November 23, 1953, the State Civil Service Commission, after making appropriate inquiries, and as an administrative determination, duly designated the Authority as a security agency (see letter referred to in footnote 6, page 24 of appellant's brief). There has been no challenge to this designation, although section 3 of the law provides a review by the courts of New York State in a proceeding under Article 78 of the Civil Practice Act.

Section 5 of the Security Risk Law permits a public body, such as the Authority, to suspend an employee occu-

pying a security position or a position in a security agency whenever it shall find, after proper investigation and inquiry, that upon all the evidence, reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state. Within the framework of the law any person thus suspended is permitted an opportunity, within thirty days after notification, to submit statements or affidavits to show why he should be reinstated or restored to duty.

On September 14, 1954, the appellant, pursuant to instructions from his immediate superior in Authority service, appeared at the office of the Commissioner of Investigation of the City of New York. Appellant was advised that he was there for the purpose of answering questions in an investigation being conducted by that office (R. 11). After being sworn, appellant refused to answer questions as to whether he was then a member of the Communist Party, and invoked the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States (R. 15). He was advised of the provisions of the Security Risk Law and was given an opportunity to reconsider his refusal. Appellant reappeared at the office of the Department of Investigation on September 21, 1954, at which time he requested, and was granted, an additional postponement to engage counsel. On September 30, 1954, appellant appeared accompanied by counsel who requested, and was granted, a further adjournment. On October 8, 1954, appellant again appeared with counsel, and again refused to answer questions as to whether he was then, or had been, a member of the Communist Party, and again invoked the Fifth Amendment to the Constitution of the United States (R. 15-16). The power of the Commissioner of Investigation to conduct this inquiry on behalf of the City of New York and the Authority, was expressly upheld by the Court of Appeals (R. 80-81).

The Commissioner of Investigation submitted a report to the Authority setting forth the relevant facts (R. 16), with the result that on October 21, 1954, by formal resolution, appellant was suspended without pay (R. 16-18). The resolution of suspension specifically set forth the fact that the appellant had refused to answer questions regarding present and past membership in the Communist Party in testifying under oath before the Department of Investigation of the City of New York on certain specified dates, and that he had on such occasions invoked the privilege set forth in the Fifth Amendment of the Constitution of the United States. The resolution also contained a finding by the Authority, pursuant to § 5 of the statute, that upon all the evidence, reasonable grounds existed for the belief that because of his doubtful trust and reliability, the continued employment of the appellant would endanger the security of defense of the nation and the state (R. 17).

This resolution was sent to the appellant with a covering letter signed by the Executive Director and General Manager of the Authority, which also recited in detail the reasons for the action taken (R. 15-16). Both the letter and the resolution clearly notified appellant that he had the opportunity, within thirty days, to submit statements or affidavits to show why he should be reinstated or restored to duty (R. 16-17). The resolution ordered the Executive Director and General Manager to conduct such further investigation and review as might be necessary in the circumstances, and to report to the Authority at the expiration of thirty days from the date of notification to the appellant (R. 18).

During the thirty-day period following the notification to the appellant, neither he nor any person upon his behalf, communicated with either his employer, the Authority, or with the Commissioner of Investigation of the City of New York (R. 19). Accordingly, by report dated November 22, 1954, the Executive Director and General Manager

notified the Authority that the thirty-day period had elapsed without any word whatsoever from the appellant, and that further investigation had revealed activities on the part of the appellant which also gave reasonable grounds for belief that he was not a good security risk, and recommended that his employment be terminated (R. 21). The Authority then found, upon review, that upon all the evidence reasonable grounds existed for the belief that because of his doubtful trust and reliability, the employment of appellant endangered the security or defense of the nation and the state, and directed that his employment be terminated effective at the close of business on November 24, 1954 (R. 21).

At this point the appellant had available to him under the provisions of the Security Risk Law an appeal to the State Civil Service Commission. The appellant did not avail himself of the right to administrative review in the course of which, as will be demonstrated *infra*, the State Civil Service Commission could have required the Authority, at a hearing or by other means, to amplify its reasons for the action taken. The appellant could have challenged the designation of his position as a security position, the designation of the Authority as a security agency, and the listing of the Communist Party as a subversive organization. Instead he commenced this proceeding under Article 78 of the New York State Civil Practice Act by the service of a notice of motion, verified petition and exhibits on or about December 10, 1954 (R. 1). The respondents counter moved to dismiss (R. 23).

Summary of Argument

This Court should refuse to take jurisdiction of this appeal because the appellant failed to avail himself of the right to appeal his dismissal to the State Civil Service Commission where he could have had a complete review of his employer's determination. He might have contended that, as a conductor, he was not occupying a security position, and he might also have challenged the designation of the Communist Party as a subversive organization. It cannot be assumed that upon such a hearing the members of the State Civil Service Commission, as responsible public officers, would have deprived appellant of any of the elements of due process.

The State of New York has a right to pass laws dealing with the removal of subversive persons from public employment. It may also provide for the removal of persons concerning whom their public employer has reasonable grounds to believe that because of doubtful trust and reliability, their employment in security positions would endanger the security or defense of the nation and the state.

The appellant, by refusing to answer questions relevant to his loyalty, which the Commissioner of Investigation put to him on behalf of his employer, breached that bond of confidence which must exist between public employer and employee. Therefore the Authority properly set in motion the procedure under the Security Risk Law for the removal of this employee for doubtful trust and reliability. As required by the law, the appellant was given thirty days within which to satisfy his employer that he should be reinstated or restored to duty. Since the employee, even though he knew that his civil service position was at stake, offered no explanation to his employer during this period, the Authority was justified in terminating his employment.

The Authority, as a public employer, had the right to look to its employee in the first instance for reassurance as to his trust and loyalty. The appellant had a corresponding duty to so reassure his employer; this he failed to do and was properly dismissed.

POINT I

The appellant having failed to avail himself of the statutory review cannot complain of lack of due process, and this Court should refuse jurisdiction.

(1)

The appellant, after he was removed from his position by the Authority under and pursuant to the terms of the Security Risk Law, had the right to appeal his removal to the New York State Civil Service Commission.

The State Civil Service Commission consists of three commissioners appointed by the Governor with the consent of the State Senate for six-year terms. No more than two of the Commissioners shall be adherents of the same political party. Thus it is an independent state agency entirely removed from the employer, Transit Authority. It has general powers to carry out the civil service policy of the state as expressed in the State Constitution (Art. V, § 6) and in the Civil Service Law (Civil Service Law, §§ 3, 6; Cons. Laws, ch. 7).

This Commission, by the provisions of the Security Risk Law, has been granted a broad, general power to entertain appeals in the following terms:

> "§ 6. Appeal to state civil service commission.
>
> Any person who believes himself aggrieved by a determination of disqualification under section four of this act and any officer or employee * * * aggrieved by a * * * dismissal under the authority

> of section five of this act may appeal from such determination by an application in writing to the state civil service commission within twenty days after receiving written notice of such determination.
>
> • • •
>
> They [the Commission or hearing officers] shall have the power to require amplification of the reasons for the action appealed from and to administer oaths, hold or conduct public or private hearings, subpoena and compel the attendance of witnesses, and the production of books, papers, records and documents. The person or persons holding such hearing shall make such inquiry as may be deemed advisable, and shall upon the request of the appellant permit him to be represented by an attorney and to present evidence in his behalf."

Thus, if the appellant felt that his employer was mistaken in its determination, or that he had been deprived of any of his substantive constitutional rights, or that he had not been accorded procedural due process, he should have raised these issues in a review before the State Civil Service Commission, which is empowered by the statute to overrule the employer's determination. The Authority could have been required by the Commission to amplify its reasons for the action appealed from. The "further activities" to which appellant refers in Point III-A of his brief, could have been thoroughly probed and examined. Finally, the contention that the appellant, as a subway conductor, was not occupying a security position, could have been urged before the Commission, and testimony could have been taken on this point.

In fact, the Commission recently overruled the dismissal of a stenographer in the New York City Department of Hospitals, and of a housing guard in the Housing Authority on the ground that it was not demonstrated that these particular employees were in security positions. These determinations of the Commission have been sustained by the court in *Matter of N. Y. City Housing Author-*

ity (Falk) and *Jacobs* v. *Falk*, Supreme Court, New York County, COXIOS, J., 139 New York Law Journal 5, January 10, 1958.

The appellant cannot be heard to complain that he has not received due process of law when he himself has been unwilling to avail himself of the procedural safeguards provided by the Legislature of the State of New York against ill-considered or unjust dismissals. There can be no presumption that the State Civil Service Commission, which is charged with the administration of the entire system of civil service in the state, would not have afforded the appellant all his constitutional rights. *People ex rel. Lieberman* v. *Van DeCarr*, 199 U. S. 552, 562 (1905); *Plymouth Coal Company* v. *Commonwealth of Pennsylvania*, 232 U. S. 531, 544-45 (1913).

The appellant is not warranted in asking the Federal Court to intervene in an area of state activity until he has availed himself of the administrative measures provided by the state statute. *Gundling* v. *Chicago*, 177 U. S. 183, 186 (1900); *Bradley* v. *Richmond*, 227 U. S. 477, 485 (1912).

The New York State Security Risk Law is not defective upon its face. As written, it establishes an orderly procedure at every step of which the rights of the public employees are carefully safeguarded. It cannot be assumed that it is to be administered in such manner as to deprive the State's civil service employees of the due process to which they are entitled under the Federal Constitution. There is no allegation that the statutory procedure was incapable of affording due process to the appellant.

One point remains to be noticed in this connection. While it is true that the statute, as written, provides that the decision of the Commission, or the persons designated by it to hear and determine the appeal, shall be final and conclusive and "shall not be subject to review in any court," there is no question, under the existing law of the State

of New York, that statutes with this language do not bar an appeal to the courts from determinations which are contrary to law or completely arbitrary. Certainly by appealing to the Commission, appellant would not have lost or waived his right to challenge the constitutionality of any of the acts either of the Authority or of the Commission. *Matter of Guardian Life Insurance Company* v. *Bohlinger*, 308 N. Y. 174 (1955); *Matter of Ross* v. *Wilson*, 308 N. Y. 605, 617 (1955).

(2)

It is obvious from the very statement of the facts that the appellant is incorrect in his assertion that the invocation of the constitutional privilege against self-incrimination, in and of itself, was the reason for his dismissal. It was the employee's refusal to answer questions put to him on behalf of his employer that prompted his dismissal, rather than the reason he gave for his refusal. The doctrine in the case of *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), which is more fully discussed in Point II, clearly holds that appellant had the obligation to assure his employer that he was not then a member of a party dedicated to the overthrow of the government by force or violence. The privilege against self-incrimination did not so change the relationship of employer and employee as to relieve him from his obligation to answer.

In *United Public Workers* v. *Mitchell*, 330 U. S. 75, 95-96, 102-103 (1947), it was held to be no violation of the First, Ninth or Tenth Amendments for the federal government to impose reasonable restrictions on the political activities of public employees to protect the integrity of the public service. The *Garner* case makes it clear that the state may adopt the same course (341 U. S. 716, 720-721).

The appellant contends that the Security Risk Law is unconstitutional in that it authorizes his dismissal from

public employment for membership, without *scienter*, in a subversive organization, and thereby is violative of the Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States. This is not the situation in the instant case. The question of the appellant's knowledge of the true aims and purposes of the Communist Party is not an issue in this case, because no inference as to membership in the Communist Party was raised by his refusal to answer questions as to membership in that party. It was the refusal to give the information to the employer which the employer had a right to have, rather than any inference of membership in the Communist Party that led to his dismissal. If he had acknowledged Communist Party membership, his knowledge of the aims and purposes of the party would then be an issue.

The appellant argues that he was not afforded equal protection of the laws because the New York State Court of Appeals had in other cases concluded that a lawyer had not forfeited his right to remain a member of the bar by invoking the privilege against self-incrimination, and had interpreted Article I, Section 6, of the New York State Constitution to require a public officer to sign a waiver of immunity when called before a grand jury only if the inquiry was as to his conduct in the public office he then held. None of the cases cited in the appellant's brief (p. 28): *In re Grae*, 282 N. Y. 728 (1940); *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, 227 (1907); *Matter of Doyle*, 257 N. Y. 244 (1931); *People* v. *Harris*, 294 N. Y. 424 (1945); *People* v. *Doyle*, 1 N. Y. 2d 732 (1956) and *Matter of Kaffenburgh*, 188 N. Y. 49 (1907), involve an employer-employee relationship such as the one presented in this case.

On the other hand, in *Canteline* v. *McClellan*, 282 N. Y. 166 (1940), the Court of Appeals, in a case affirming the obligation of police officers to execute a waiver of immunity

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and to testify before the grand jury about affairs taking place before the adoption of a specific constitutional requirement to such effect, held that the people have the power to set conditions for public employment, with which there must be compliance. In the absence of a showing by the appellant that contrary conclusions were reached where the employer-employee relationship was involved, he cannot successfully contend that he did not have equal protection of the laws.

The appellant's reliance on *Sheiner* v. *Florida*, 82 So. 2d 657 (1955), is misplaced since that court made a distinction between a refusal by an attorney to answer as to Communist Party membership on the ground of possible self-incrimination and the situation where the privilege is used by a person in public employment being questioned by his employer.

The Commissioner of Investigation, in conducting his inquiry for the City of New York and the Transit Authority as to the appellant's membership in the Communist Party, was acting in this capacity as a city officer concerned with information vital to the Transit Authority and the City. The Commissioner derives his powers from New York City Charter § 803 and is appointed by the Mayor. Therefore, he cannot be said, in any way, to have been acting as an agent for the Federal Government. Accordingly, the appellant's contention that this was, in effect, a federal proceeding, and that he cannot be penalized for invoking a federally-given privilege in a federal proceeding, is untenable. The Court of Appeals having ruled specifically that the Commissioner of Investigation was acting with the authorization, pursuant to statute, of the Transit Authority, and in the complete absence of anything in the record to indicate that the Commissioner of Investigation was acting for any federal agency, it would appear that this issue is foreclosed to the appellant.

POINT II

The refusal of a public employee to assure his employer that he was not then and had not been a member of the Communist Party, justifies the employer's conclusion that the employee is of doubtful trust and reliability.

(1)

The appellant was under an obligation to answer responsively when asked by the Commissioner of Investigation whether or not he was a current member of the Communist Party. The right of a public employer to question an employee concerning membership in the Communist Party, and the corresponding duty of the employee to make a full and frank disclosure to his employer, has received the sanction of this Court. In *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), this Court sustained a Los Angeles ordinance which required public employees to execute an affidavit as to whether they were then, or ever had been, members of the Communist Party or the Communist Political Association. Two employees, who had refused to supply this information, were dismissed. In recognizing the right of a municipal employer to make inquiry of its employees as to matters that may prove relevant to their fitness and suitability for public service, this Court removed any doubt as to the obligation of public employees to answer questions as to past conduct which might bear upon present fitness. The same basic principle was reaffirmed by this Court in *Adler* v. *Board of Education*, 342 U. S. 485, 492 (1952), in which the constitutionality of New York State's Feinberg Law (Education Law, § 3022), was affirmed.

The invoking of the privilege against self-incrimination by the appellant may not give rise to an inference that he

is guilty of a crime, but to retreat behind such a barrier is clearly inconsistent with the obligation a public employee owes to his employer. The refusal to answer the question thwarts the employer at the very threshold of his inquiry into his employee's loyalty, and destroys the confidence which must exist between employer and employee. This is especially true in the field of security. The reason for the employee's refusal to answer is locked within the secrets of his own mind. It leaves the employer in complete doubt as to the employee's loyalty. The employer has nothing to evaluate but the point-blank refusal.

In *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, rehearing denied 351 U. S. 944 (1956), and *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), this Court was careful to cast no doubt upon the obligation of a public employee, under proper circumstances, to respond to questions put to him by his employer, by distinguishing the facts in the *Wieman* and *Slochower* cases, *supra*, from the *Garner* and *Adler* cases, *supra*. Mr. Justice CLARK, in writing for the Court in the *Slochower* case, quoted from the *Garner* decision as follows:

> "'* * * [this Court] upheld the right of the city to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for the public service,' including their membership, past and present, in the Communist Party or the Communist Political Association. There it was held that the city had power to discharge employees who refused to file an affidavit disclosing such information to the school authorities." (350 U. S. 551, at 556)

The *Slochower* case is authority only for the proposition that a teacher with tenure was denied due process when a statute was construed so as to automatically separate him from his position upon invoking the privilege against self-incrimination in refusing to answer an inquiry by a United States Senate subcommittee as to prior Com-

munist Party membership which prior membership had been known to the Board of Higher Education for some twelve years. The chairman of the subcommittee had stated that the inquiry was not directed at the property, affairs or government of the City of New York. The evil the Court found was that the statute was so constructed as to provide for automatic forfeiture of position regardless of the circumstances under which the privilege against self-incrimination was invoked. This Court anticipated the instant case when Mr. Justice CLARK, said in the *Slochower* case:

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.' In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information.
>
> "Without attacking Professor Slochower's qualification for his position in any manner, and apparently with full knowledge of the testimony he had given some 12 years before at the state committee hearing, the Board seized upon his claim of privilege before the federal committee and converted it through the use of § 903 into a conclusive presumption of guilt. Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support. * * * " (350 U. S. 551, at 558-559)

The record in the instant case demonstrates conclusively that the inquiry as to current Communist Party

membership was made specifically for the appellant's employer for the sole purpose of determining the employee's fitness to continue to serve as a public employee of the Authority. It is equally apparent from the record that the Authority gave careful consideration to the circumstances surrounding the asking of the question and the repeated refusal on the part of the employee to answer the question. The dismissal was based on the particular facts in the case and had none of the elements of automatic forfeiture present in the *Slochower* case. The appellant was also afforded an opportunity for a complete review of his dismissal by the State Civil Service Commission, of which he did not avail himself.

An examination of the facts in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), reveals that the Supreme Court of Oklahoma had interpreted the statute in such a manner that persons would be excluded from public employment on the basis of organizational membership, regardless of their knowledge of the aims and purposes of the organization to which they belonged. The New York State Court of Appeals has not interpreted the Security Risk Law in any such manner. As a matter of fact, in upholding the constitutionality of the Feinberg Law, this Court expressly noted that the New York courts had required *scienter* before dismissal could be had for membership in an organization found to advocate the unlawful overthrow of the government. See *Adler* v. *Board of Education*, 342 U. S. 485, 494 (1952); 301 N. Y. 476, 494 (1951).

The question put to the appellant herein, with respect to Communist Party membership, was based upon the fact that, as permitted by section 8 of the law, the State Civil Service Commission had adopted a designation of the State Board of Regents declaring the Communist Party to be a subversive organization. This procedure was the same as that provided for in the Feinberg Law which was found constitutionally unobjectionable in *Adler* v. *Board of Edu-*

cation, supra. The designation of the Communist Party by the State Board of Regents was made after due notice to said organization and an opportunity afforded it to answer.

This case is also different from *Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1957), since in that case, an employer-employee relationship did not exist. It is distinguished on the further ground that the appellant in the case at bar at all times was made to realize that a persistent refusal to answer questions with respect to his fitness for employment would inevitably result in the loss of his position.

Equally inapplicable to the present case is *United States ex rel. Belfrage* v. *Shaughnessy*, 212 Fed. 2d 128 (U. S. Circuit Court, Second Circuit, 1954). That case was a deportation case, and to the extent that the decision seems to countenance the pleading of the Fifth Amendment out of a reluctance to implicate others, or to disturb their privacy, it is respectfully submitted that it is opposed to the great weight of authority in this Court. Even if it were held that the Fifth Amendment may be invoked for such reasons, it would not relieve the public employee from his obligations to his employer.

In the case at bar, Chief Judge Conway, writing for the New York Court of Appeals, analyzed the appellant's conduct in relation to his obligations to his employer pursuant to the statute. The Court reasoned as follows (2 N. Y. 2d 355, 369):

> "If seems to us that it would be more clear if we suppositiously divided the conduct of petitioner into two parts. The first, when he was asked by his employer whether he was then a member of the Communist party. That question he refused to answer. He then left the room. Certainly by that conduct he would have given evidence of his own untrustworthiness and unreliability. Suppose then, as the second part of his conduct, he returned five minutes later and told the commissioner of inves-

> **tigation that he had refused to answer his question because to do so might tend to incriminate him. May not the employer discharge an employee who refuses to answer his proper question? If the petitioner, in the case supposed, had not returned to the commissioner five minutes later and given a reason for his conduct, we think all would agree that he was properly discharged. Does it change the situation because he returns to say that he refused to answer because to do so might tend to incriminate him? Does that explanation destroy the evidence which he has given to his employer of his untrustworthiness and unreliability as a security risk? Does the explanation *require* that the employer consider without any doubt that the employee by his explanation has again become trustworthy and reliable as a security risk as a matter of law? We think not." (R. 83)**

This Court has recognized that the rights, privileges and immunities guaranteed by the United States Constitution are not absolute and unrelated to limiting circumstances. In *Dennis* v. *United States*, 341 U. S. 494 (1951), this Court speaking of the alleged unconstitutional impingement of the Smith Act on the rights of free speech, said (p. 508):

> "Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See *American Communications Assn.* v. *Douds*, 339 U. S. at 397. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."

The constitutional privilege against self-incrimination is not an absolute right which relieves the invoker from all

other obligations he may owe. Although it is clear that a person cannot be required to be a witness against himself and that such a refusal may not be the basis for an inference of guilt of a crime, the privilege cannot be used to compel his employer to accept its invocation as a substitute for the answer to which the employer is entitled.

See also *Ullmann* v. *United States*, 350 U. S. 422 (1956); *Feiner* v. *New York*, 341 U. S. 315 (1951); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1941).

(2)

The contention of the appellant that no emergency could conceivably justify his dismissal, since his position as a conductor could have no rational connection with national security, is demonstrably untenable. To properly evaluate appellant's official responsibilities, reference must be made to the description of duties duly promulgated by the City Civil Service Commission in 1952. These requirements were advertised in the City Record pursuant to Civil Service Law, § 11, subd. 2, as implemented by Rule V, § IV, subd. 8 of the Civil Service Commission of the City of New York, and are printed as Appendix A to this brief. An excerpt from the Authority's rules and regulations governing conductors is printed as Appendix B. It can be readily seen that if the appellant were a member of the Communist conspiracy, he would, as an operating employee of a transit system moving six million people daily, certainly be a threat to the security of the state and the city, as well as the nation. The argument, "What harm can one conductor do?" was well answered by Mr. Justice Jackson in his concurring opinion in *Dennis* v. *United States*, 341 U. S. 494, 564 (1950):

> "The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected,

> dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in *transportation*, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion." (Emphasis supplied.)

In evaluating the importance of the appellant's position to the security of the state, this very point, Chief Judge Conway said:

> "• • • [We] are in accord with respondents that the importance of the petitioner's position to the security of the State and of the City of New York can be readily seen when it is considered that in modern warfare the civilian population may well be a prime target. A bombing raid on New York City would undoubtedly be planned for a time when the maximum number of people would be in the city. The most important facility for the evacuation of the people would be the subway system. If the petitioner were a member of the Communist conspiracy he would, as an employee of the transit system in charge of a train, as conductors are, be a very real threat to the security of the State and of the city." (R. 83-84)

The recently decided case of *Cole* v. *Young*, 351 U. S. 536 (1956) has no application to the case at bar. The *Cole* case involved an interpretation by this Court of the so-called Federal Security Risk Law (Title 5, U. S. C., 22-1). This Court pointed out that the statute made its provisions specifically applicable to named government departments which the Court found were concerned with military operations, weapons development, international

relations, internal security, and stock piling of strategic materials. The Act then went on to empower the President to extend its provisions "to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security." The President extended the provisions of the statute to every government department. This Court held that Cole, who was dismissed under this law from his position as a food and drug inspector for the Department of Health, Education and Welfare, should have been charged pursuant to the regular removal statutes, since the governmental agency employing him was not the type of agency contemplated by the Federal Security Risk Law.

Inherent in the decision of the New York Court of Appeals in the instant case was the holding, based on the record before the Court, that the appellant did occupy a security position within the contemplation of the statute. Based on the record in this case, the appellant cannot be heard to complain of such a holding, since he did not avail himself of the right to contend that his position was not in fact a security position by seeking a review, pursuant to the statute, before the State Civil Service Commission.

(3)

The appellant contends that the principle enunciated in *Garner* v. *Los Angeles Board*, 341 U. S. 716 (1951), recognizing the right of the municipal employer to ask and the obligation of the public employee to answer as to Communist Party membership, is confined to those situations where a statute specifically requires the employee to make such answer. With this as his premise he argues that although the New York State Security Risk Law provides for the listing of subversive organizations after appropriate hearing, the law does not specifically obligate the employee to answer questions as to membership in such organizations.

This assumption is at complete variance with the well-established principle that certain obligations and rights flow from the very nature of particular relationships between people. It is obvious that as between husband and wife, doctor-patient, lawyer-client, teacher-pupil, employer-employee relationships exist which give rise to inherent rights and obligations over and above those relationships normally existing among people. While the law undertakes to recognize these rights and obligations by defining them in general terms, it does not create them. Clearly the law could not undertake to declare the obligations and rights in every conceivable situation which might arise in an employer-employee relationship. See *Christal* v. *San Francisco*, 33 Cal. App. 564; 92 P. 2d 416 (1939).

In order to secure qualified people for public service their selection and tenure are governed by law but this does not change the basic employer-employee relationship. The public employer, who is acting for the people, has the right to receive from the public employee the information the employer needs to properly discharge his trust.

The appellant argues that the New York Security Risk Law requires the public employer to make an affirmative showing of evidence to demonstrate that the employee is a security risk and cannot look in the first instance to the employee himself for assurance as to his trustworthiness. The New York Court of Appeals in its interpretation of the statute rejected such a strained construction and reiterated the time-honored obligations inherent in the employer-employee relationship. The Court pointed out in this case (2 N. Y. 2d 355, 369):

> "The intent of the Security Risk Law was to set up a removal procedure which would provide a more ready means of removing security risks from public service than sections 22 or 12-a of the Civil Service Law. This is apparent from the fact that even under the Civil Service Law an employee, refusing to answer questions put to him by his employer pertaining to his official conduct, may be

removed, after a hearing, under a charge of insubordination without any showing by the employer of the information which prompted the inquiry." (R. 83)

It is apparent from an examination of the Security Risk Law that public employers are directed by the legislature to remove public employees properly found to be of doubtful trust and reliability. Having imposed this duty upon the employer it necessarily follows that the employer was empowered to make inquiry of the employee himself, surely the most direct as well as the fairest means of ascertaining the truth.

The Security Risk Law, as interpreted by the New York Courts, is a proper means taken by a state to protect the state and the nation from public employees concerning whose loyalty a reasonable doubt exists. The refusal to answer questions as to membership in an organization found, after due hearing, to be subversive provides a reasonable basis for the employer to conclude that the employee has broken the confidence which the public has a right to make a condition of continued employment.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction or, if jurisdiction is taken, the order appealed from should be affirmed.

Dated: February 24, 1958.

Respectfully submitted,

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Appendix A

"MUNICIPAL CIVIL SERVICE COMMISSION
THE CITY OF NEW YORK

NOTICE OF EXAMINATION

No. 6505

PROMOTION TO CONDUCTOR

New York City Transit System

* * *

DUTIES: To be immediately responsible for the safety, regularity and proper care of trains, in accordance with the rules, regulations and special instructions governing the employees in operation; when assigned as conductor of trains to take charge of trains; when assigned to secondary position of trains, to assist conductor in charge in the performance of his duties; when assigned to stations, to handle passengers, assist in the safe dispatch of trains, watch exit gates, patrol stations and perform special duties for the protection of passengers; when assigned to yard or work-train service, to operate hand-throw switches, assist in making couplings, serve as flagman; turn in lost property; make detailed reports of unusual occurrences; perform such other duties as the Board of Transportation is authorized by law to prescribe in its regulations." (The City Record, Vol. LXXX, p. 6268, Sept. 9, 1952).

Appendix B

Pursuant to Public Authorities Law, § 1204, the Transit Authority has adopted and promulgated Rules and Regulations governing employees engaged in operation of the New York City Transit System. Rule 99 proclaims the duties of conductors assigned to train service. The following excerpts from this rule demonstrate some of the responsibilities vested in Conductors, the position formerly held by appellant:

"(b) They will have charge of trains and be responsible for the safety, regularity and proper care and condition of trains, and such orders as they may give, not conflicting with the rules and regulations or special instructions, must be obeyed.

"(c) THEY MUST TAKE EVERY PRECAUTION FOR THE SAFETY OF THEIR TRAINS AND PASSENGERS AND IF ANY DEFECTS ARE FOUND IN THE CARS THEY MUST REPORT SAME PROMPTLY TO MOTORMAN AND TRAIN DISPATCHER.

* * *

"(v) If, for any cause, the train comes to a stop at an unusual point not protected by signal, the conductor responsible for the door operating position governing the rear car or cars, must immediately protect the rear end of the train by stationing himself with a lamp or flag in the rear of the train prepared to flag the following train at a safe distance away to avoid collision."